No. 83-2073

In the Supreme Court of the United States

OCTOBER TERM, 1984

BETTY RUTH S. FERGUSON, PETITIONER

v.

HARRY N. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT S. GREENSPAN
MARILYN S.G. URWITZ
Attorneys

Department of Justice
Washington, D.C. 20530

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2073

BETTY RUTH S. FERGUSON, PETITIONER

v.

HARRY N. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the failure of the Veterans Administration to train and select her for a librarian's position for which she concededly was not qualified constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

1. Petitioner was a GS-6 medical records technician at the Tuscaloosa, Alabama, Veterans Administration Medical Center. In October 1980, she applied for a GS-9 level position as a librarian for medical and biological sciences at the Center. She subsequently was informed that she did not have the requisite educational qualifications for the job. Pet. App. A4-A5, A12-A13. Ultimately, the Center hired another woman who did have the requisite qualifications. Pet. App. A5, A13.

Petitioner then brought this action against the Administrator of Veterans Affairs in the United States District Court for the Northern District of Alabama, contending that she was rejected for the position because the Center had failed to implement an affirmative action plan as mandated by 42 U.S.C. 2000e-16(b)(1); Exec. Order No. 11,478, 3 C.F.R. 133 (1969 comp.); 29 C.F.R. Pt. 1613; and the VA Manual MP-5 Pt. I, ch. 713 (Aug. 12, 1974). This alleged failure to implement such a program, she maintained, was itself a violation of Title VII. Pet. App. A14-A15.

The district court granted summary judgment in favor of the Administrator (Pet. App. A11-A19), and the court of appeals affirmed (Pet. App. A1-A8). The court of appeals concluded that petitioner had failed to establish a prima facie case of discrimination under a disparate treatment theory in connection with the Center's failure to promote her to the GS-9 librarian position, because that theory requires, inter alia, a showing that the rejected applicant was qualified for the position. Pet. App. A5-A6. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The court of appeals also held that petitioner had failed to prove discrimination under a disparate impact theory, because she offered no evidence that the selection process or the administration of the affirmative action program had a disproportionately adverse effect on women. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In particular, the court reasoned, the selection of another woman for the job in question suggested that this was not the case. Pet. App. A6-A7.

The court of appeals further explained that absent a showing of discrimination, there is no cause of action under Title VII based simply on the failure of a federal agency to implement or utilize an affirmative action program. Pet. App. A2. In so holding, the court adopted both the reasoning and the conclusion of the en banc decision in *Page* v.

Bolger, 645 F.2d 227 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981). Quoting the Fourth Circuit's decision in *Page* v. *Bolger, supra,* the court of appeals reasoned that if the result were otherwise, "[a]ffirmative action undertakings by government employers would come in practical terms to define the standards for compliance with Title VII's antidiscrimination provisions" (Pet. App. A3, quoting 645 F.2d at 233-234).

2. Petitioner concedes (Pet. 8, 12) that she lacked the educational prerequisites for the librarian's position at the time the vacancy in question was filled and that it was necessary for her to resume her formal education in order to attain them. She nonetheless argues (Pet. 9-21) that the courts below erred in holding that she had not established a violation of Title VII. This contention is without merit.

a. It is clear that petitioner has not established a prima facie case of disparate treatment under Title VII, because she concededly has not satisfied one of the essential elements of her case: a showing that she possessed the necessary qualifications. See, *e.g., McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Commuuity Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). Petitioner does not claim that the Center was under a court order to remedy any proven past discrimination through affirmative action or that the Center was somehow obliged to provide her with the course credits she had not secured on her own. Rather, she says her lack of qualifications was "irrelevant" (Pet. 12) because the Veterans Administration had not "appropriately emphasize[d]" those qualifications to her over the years preceding the October 1980 vacancy.[1]

---

[1]However, although the courts below did not consider it necessary to rule on the implementation of affirmative action at the Center, the Veterans Administration offered affidavits to support its summary judgment motion showing, inter alia, that the Center had a policy of

Even if we assume, however, that the Veterans Administration had a responsibility under accepted personnel practices to prepare her educationally for the librarian's position and that it did not properly apprise her of the requirements for that job, petitioner still has not established a Title VII violation. See *Page* v. *Bolger*, 645 F.2d at 233-234; cf. *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (6th Cir. 1974) (failure to train not a Title VII violation). Title VII itself does not mandate that these or any other terms or conditions of employment be afforded to an employee. Insofar as the federal sector is concerned, Title VII provides that "[a]ll personnel actions affecting employees or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Thus, only if the failure to provide training or information or some other term or condition of employment to petitioner had been the result of "discrimination based on * * * sex" would a Title VII violation be establilshed. Cf. *Hishon* v. *King & Spaulding*, No. 82-940 (May 22, 1984), slip op. 4-7. Petitioner, however, has not shown that training or information was withheld from her because she is a woman, or pursuant to a practice which discriminates against women.

b. Petitioner's claim (Pet. 13-16) with respect to disparate impact — *i.e.*, that, because the Veterans Administration allegedly continues to allow [] employees to fend

---

providing career information and counseling to all employees; that posted notices and Merit Promotion Plan handouts advised employees to seek career counseling; and that in August 1978, petitioner attended a workshop sponsored by the Center at which participants were instructed how to apply for positions and how to ascertain educational and experiential requirements for jobs in which they were interested (R. 1029). A separate affidavit from one of petitioner's supervisors indicated that she had informed petitioner of a vacancy in 1977 but that petitioner said she would not pursue it because she did not wish to return to school in order to fulfill the requirements of the job (R. 1032).

for themselves in seeking promotional opportunities" (Pet. 15), it has violated title VII —is similarly untenable. Petitioner has not pointed to any specific employment practice that has disadvantaged women as a group. To the contrary, as the court of appeals noted (Pet. App. A6), petitioner introduced no evidence that any of the requirements for the librarian position were discriminatory, that the selection process for the job had an adverse impact on women, or that the affirmative action program was discriminatorily administered.

c. Finally, petitioner is clearly wrong in suggesting (Pet. 17-22) that an alleged failure by an agency to comply with a particular aspect of its affirmative action plan in itself gives rise to a cause of action under Title VII, even in the absence of a showing of discrimination based on a prohibited ground. She cites no authority for that proposition, and in fact it is refuted by an examination of the text of Title VII. The Section of Title VII authorizing the bringing of a civil action by a federal employee (42 U.S.C. 2000e-16(c)) permits such a suit to challenge a discriminatory personnel action taken in violation of 42 U.S.C. 2000e-16(a). The requirement that an agency devise an affirmative action plan does not appear in Subsection (a) of 42 U.S.C. 2000e-16; it is contained in Subsection (b), which concerns the general administrative responsibilities of the employing agency and the EEOC, not the private rights of employees and applicants.

Moreover, as the Fourth Circuit observed in *Page* v. *Bolger, supra*, in creating enforceable private rights under Title VII, Congress focused on "ultimate employment decisions" rather than on some "mediate" action, such as implementation of an affirmative action program. 645 F.2d at 233-234. Congress doubtless anticipated that there would be experimentation and variation among federal agencies in the formulation of their affirmative action plans. As the

court below and the Fourth Circuit in *Page* v. *Bolger* both concluded, Congress did not intend for the features of such plans, which may well change from year to year even within a single agency, to define the standards for compliance with Title VII. Such a holding would create uncertainty in the development of Title VII law. It also could serve to chill the efforts of agencies to take appropriate measures actively to promote equal opportunity, because of a fear that any steps that go beyond the minimum requirements of Title VII, as courts have traditionally enforced it, would lead to liability.

This Court declined to grant review of the Fourth Circuit's holding in *Page* v. *Bolger* on this issue, and the same course is appropriate here. Indeed, the plaintiff who challenged the composition of a promotions committee in *Page* v. *Bolger* at least was qualified for the position he sought, although the committee found that others were more so. 645 F.2d at 229. Here, petitioner cannot even make that claim. Since there is no conflict among the courts of appeals on this issue, review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT S. GREENSPAN
MARILYN S.G. URWITZ
Attorneys

NOVEMBER 1984

DOJ-1984-11